No. 18-489

In the Supreme Court of the United States

BRADLEY WESTON TAGGART, PETITIONER

v.

SHELLEY A. LORENZEN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether, under the Bankruptcy Code, a creditor's good-faith belief that the discharge injunction does not apply precludes a finding of civil contempt.

PARTIES TO THE PROCEEDING BELOW

Petitioner is Bradley Weston Taggart.

Respondents are Shelley A. Lorenzen, executor of the estate of Stuart Brown; Terry W. Emmert; Keith Jehnke; and Sherwood Park Business Center, LLC.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 888 F.3d 438. The opinion of the bankruptcy appellate panel (Pet. App. 21a-51a) is reported at 548 B.R. 275. The opinion of the bankruptcy court regarding contempt liability (Pet. App. 52a-64a) is reported at 522 B.R. 627. The opinion of the bankruptcy court regarding contempt damages (Pet. App. 65a-75a) is unreported but available at 2015 WL 1320163.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 2018. A petition for rehearing was denied on September 7, 2018 (Pet. App. 16a-20a). The petition for a writ of certiorari was filed on October 15, 2018, and granted on

January 4, 2019. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

Section 524 of the Bankruptcy Code, 11 U.S.C. 524, provides in pertinent part:

> (a) A discharge in a case under this title—
>
> * * * * *
>
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived * * *.
>
> * * * * *

Section 105 of the Bankruptcy Code, 11 U.S.C. 105, provides in pertinent part:

> (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.
>
> * * * * *

Rule 4007 of the Federal Rules of Bankruptcy Procedure, Fed. R. Bankr. P. 4007, provides in pertinent part:

> (a) PERSONS ENTITLED TO FILE COMPLAINT. A debtor or any creditor may file a complaint to obtain a determination of the dischargeability of any debt.

(b) TIME FOR COMMENCING PROCEEDING OTHER THAN UNDER § 523(C) OF THE CODE. A complaint other than under § 523(c) may be filed at any time. A case may be reopened without payment of an additional filing fee for the purpose of filing a complaint to obtain a determination under this rule.

* * * * *

INTRODUCTION

This case presents a simple question of federal bankruptcy law that is essential to the Code's effective administration. According to the Ninth Circuit, a creditor's "good faith" is sufficient to excuse a discharge violation, "even if the creditor's belief is unreasonable." In so holding, the Ninth Circuit departed from the opposite rule applied in other jurisdictions across the country for decades. In those courts, unlike the Ninth Circuit, a creditor who violates the discharge is liable in contempt, and the creditor's "subjective beliefs or intent" are irrelevant to that analysis.

The Ninth Circuit's novel rule is wrong, and the significance of its error is profound. A holding that a "good faith belief, even if unreasonable, insulate[s]" creditors from contempt (Pet. App. 13a) eviscerates the Bankruptcy Code's key mechanism for enforcing the discharge injunction and securing a debtor's fresh start. It asks innocent debtors to absorb the costs of creditor mistakes, and it deprives debtors of the essential tool for ending discharge violations and recovering their losses. Those losses are especially intolerable for debtors who have just emerged from bankruptcy, and whose finances remain in a fragile state.

The Ninth Circuit's stark departure from traditional practice is incompatible with principles of general civil contempt, and it conflicts with the Code's text, context,

purpose, and history. The traditional rule has promoted the Code and advanced Congress's interests for decades; the Ninth Circuit's unusual approach threatens to destabilize the proper functioning of the bankruptcy system, and severely undermine the Code's paramount interest in securing the debtor's fresh start. The decision below should be reversed.

STATEMENT

A. Background

1. The "principal purpose" of the Bankruptcy Code is granting debtors a "fresh start"—"'a new opportunity in life and a clear field of future effort, unhampered by the pressure and discouragement of preexisting debt.'" *Grogan* v. *Garner*, 498 U.S. 279, 286 (1991). To achieve that objective, the Code "discharges" most pre-petition debts (*e.g.*, 11 U.S.C. 727(b)), and "enjoins" creditors from trying to collect discharged debts (*e.g.*, *Bessette* v. *Avco Fin. Servs., Inc.*, 230 F.3d 439, 444 (1st Cir. 2000)). The scope of the protection is broad and automatic: once granted, a discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor." 11 U.S.C. 524(a)(2).

Congress designed this injunction "to give complete effect to the discharge": it "eliminate[s] any doubt concerning the effect of the discharge as a total prohibition on debt collection efforts," and "insure[s] that once a debt is discharged, the debtor will not be pressured in any way to repay it." H.R. Rep. No. 595, 95th Cong., 1st Sess. 365-366 (1977); see also S. Rep. No. 989, 95th Cong., 2d Sess. 80 (1978). The discharge, in short, "is the 'legal embodiment * * * of the fresh start.'" *In re Ybarra*, 424 F.3d 1018, 1022 (9th Cir. 2005).

2. Congress enforced these rights with Title 11's statutory contempt powers. Under 11 U.S.C. 105(a), courts may issue "any" order "necessary or appropriate" to "carry out the provisions of this title," and may "tak[e] any action or mak[e] any determination necessary or appropriate" to "enforce or implement court orders or rules." 11 U.S.C. 105(a). When the discharge is violated, Section 105 authorizes the provision of "'full remedial relief.'" *Bessette*, 230 F.3d at 445; see also *Espinosa* v. *United Student Aid Funds, Inc.*, 553 F.3d 1193, 1205 n.7 (9th Cir. 2008) ("sanctions" are authorized to "make [the debtor] whole") (citing 2 *Collier Bankruptcy Manual* (3d rev. ed.) ¶ 524.02[2][c]), aff'd, 559 U.S. 260 (2010).

B. Facts And Procedural History

1. This case's procedural history is "complex" (Pet. App. 4a), but the few pertinent facts are straightforward. The case arises out of a business dispute over membership interests in a LLC. Respondents sued petitioner in state court for allegedly transferring petitioner's interest in the LLC without honoring the agreement's right of first refusal. On the eve of trial, petitioner filed for Chapter 7 bankruptcy. The trial was stayed, and petitioner ultimately received a discharge. *Id.* at 4a-5a.

Thereafter, petitioner, citing the discharge, sought to be dismissed from the state-court litigation. (The proceedings were otherwise going forward against petitioner's attorney, who had acquired the LLC interest.) The trial court refused, finding petitioner was a necessary party, but the parties agreed not to pursue a money judgment against him. Pet. App. 5a-6a. After respondents prevailed at trial, however, they sought attorney's fees from petitioner, alleging that his post-bankruptcy participation in the case (which respondents themselves had demanded) fell outside the discharge injunction. *Id.* at 6a-7a.

Petitioner moved to reopen his bankruptcy case, and sought to hold respondents in contempt for violating the discharge injunction. Pet. App. 7a. The issue was simultaneously litigated in state and federal court. After separate appeals in each system, both the state appellate court and the federal district court found that respondents had indeed violated the discharge injunction. *Id.* at 8a-9a.[1]

2. a. The bankruptcy court subsequently held respondents in contempt for their willful violation of the discharge injunction. Pet. App. 52a-64a.

The bankruptcy court noted that discharge violations are enforced "by a motion invoking the contempt remedies allowed for in § 105(a)." Pet. App. 55a n.5. As the court explained, a creditor's violation must be "'willful'" to qualify for sanctions, and willfulness is determined by a two-part test: "[the court] must find first, that the alleged contemnor knew that the discharge injunction applied, and second, that the alleged contemnor intended the actions that violated the discharge injunction." *Id.* at 58a.

In applying that test, the court specifically rejected respondents' assertion that a creditor's "good faith belief" forecloses liability. Pet. App. 58a-63a; see also *id.* at 59a-

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[1] The state trial court initially found that respondents' request for post-petition attorney's fees fell outside the discharge; that ruling was reversed by the Oregon court of appeals. See *Sherwood Park Bus. Ctr., LLC* v. *Taggart*, 267 Or. App. 217, 230 (Or. Ct. App. 2014) (finding petitioner "sought to extricate himself from the litigation and thereby obtain the fresh start the bankruptcy was intended to afford him"; his "minimal" actions sought "to shield himself from the continued litigation"). The bankruptcy court also found (relying in part on the state trial court's decision) that respondents' conduct fell outside the discharge; that ruling was reversed by the federal district court. *Taggart* v. *Brown*, No. 3:12-cv-236-MO, 2012 WL 3241758, at *4-*5 (D. Or. Aug. 6, 2012) (finding petitioner sought "to extricate himself from the lawsuit altogether"; his "actions were reactionary" and "in response to a potential judgment against him for attorney fees").

60a (expressly grounding its holding in "the Eleventh Circuit's willfulness test" from *In re Hardy*, 97 F.3d 1384 (11th Cir. 1996)). As the court explained, "[w]hether the Respondents knew the discharge was 'invoked' is a simple fact-based inquiry." *Id.* at 59a. And that inquiry "does not allow for the subjective belief, good faith or otherwise," regarding whether the discharge applied. *Id.* at 59a-60a.

With respondents' good-faith defense out of the picture, the bankruptcy court easily found a "willful" violation: (i) "it is not disputed that Respondents had actual knowledge that [petitioner's] bankruptcy discharge had been entered" when they pursued post-petition fees (Pet. App. 61a-62a); and (ii) "[t]here is no dispute in the record that [respondents] intended" the actions that violated the discharge (*id.* at 63a). The court accordingly held respondents "in contempt" for "violating [the] discharge injunction." *Id.* at 64a.

b. The bankruptcy court next determined petitioner's actual damages from the discharge violation. Pet. App. 65a-75a. Based on testimony and evidence developed at a hearing, the court entered an award of $5,000 for petitioner's "substantial harm in terms of his emotional distress," and an award of $105,593.71 for the fees and costs petitioner incurred as a result of the discharge violation. *Id.* at 69a, 73a.

The court also entered a $2,000 punitive-damages award for respondents' failure to timely vacate the state-court judgment hitting petitioner with post-petition fees. Pet. App. 74a-75a. As the court explained, respondents failed to correct the problem on their own—even after their conduct was declared unlawful—and "it ultimately required an order of this court * * * to get the supplemental attorneys' fees judgment vacated." *Id.* at 75a. The

court found "mild[] coercive punitive damages" were "appropriate as a sanction to insure that [petitioner's] discharge order is observed in [the] future." *Id.* at 74a-75a.

3. The bankruptcy appellate panel (BAP) reversed. Pet. App. 21a-51a.

Like the bankruptcy court, the BAP found the key facts undisputed: respondents were aware of petitioner's discharge and intended their actions in state court (pursuing discharged attorney's fees against petitioner). Pet. App. 36a-37a, 49a. But the BAP found the bankruptcy court applied "an incorrect legal standard" in holding respondents in contempt. *Id.* at 24a-25a.

According to the BAP, although the bankruptcy court referenced the Ninth Circuit's "correct" standard for finding a "willful[]" violation, it erred in "instead us[ing] the [Eleventh Circuit's] test from *Hardy*." Pet. App. 36a; see also *id.* at 48a ("the bankruptcy court erred when it relied on the *Hardy* test rather than using the Ninth Circuit's test"). As the court explained, "the Ninth Circuit has crafted a strict standard" in this setting: it "requires evidence showing the alleged contemnor was aware of the discharge injunction *and* aware that it applied to his or her claim." *Id.* at 43a-44a. The latter showing, the court continued, requires "a fact-based inquiry which implicates a party's subjective belief, even an unreasonable one." *Id.* at 44a. Accordingly, as the BAP concluded, "in order to recover for a violation of the discharge injunction, the debtor must establish the actor's subjective state of mind." *Id.* at 47a n.13.

The BAP thus held the bankruptcy court erred in declaring that respondents' "subjective or good faith beliefs were irrelevant." Pet. App. 49a. It thus reversed the bankruptcy court and vacated the sanctions award. *Id.* at 51a.

5. a. The Ninth Circuit affirmed, holding that respondents could "[]not be held in contempt" because they believed in "good faith" that the discharge injunction was inapplicable. Pet. App. 1a-15a.[2]

The Ninth Circuit initially noted that bankruptcy courts "may enforce the discharge injunction by holding a party in contempt for knowingly violating the discharge." Pet. App. 10a; *id.* at 12a n.4 (recognizing Section 105(a) as the source of contempt authority). But it found the bankruptcy court applied "an incorrect rule of law" in holding respondents in contempt. *Id.* at 12a.

According to the Ninth Circuit, a creditor's "good faith belief" excuses a discharge violation, "even if the creditor's belief is unreasonable." Pet. App. 12a. The court acknowledged its holding "appears to be somewhat in tension" with other decisions. *Id.* at 13a & n.5.[3] But it found itself bound by circuit precedent, "where [the circuit] stated that even an unreasonable belief that the discharge injunction did not apply to a creditor's claims would preclude a finding of contempt." *Id.* at 12a (citing *In re Zilog, Inc.*, 450 F.3d 996, 1009 n.14 (9th Cir. 2006)). As the panel understood its past authority, the circuit's decisions did not merely ask whether a creditor *knew* of a discharge,

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[2] The parties had filed a series of cross-appeals, with petitioner challenging the BAP's determination that good faith precludes a sanctions award, and respondents challenging the district court's determination that they had violated the discharge. Pet. App. 9a. As explained below, one respondent eventually conceded that the discharge injunction was violated (*id.* at 14a & n.6), and the Ninth Circuit "decline[d]" to reach the other respondents' cross-appeals due to its dispositive holding on the good-faith defense. *Id.* at 14a.

[3] In expressly acknowledging this "tension," the panel flagged language from an earlier circuit decision articulating the legal standard for violations of the automatic stay, which the panel admitted was a direct quote from the Eleventh Circuit's decision in *Hardy*. Pet. App. 13a.

but instead whether the creditor knew "the discharge injunction [was] 'applicable'" to their claims. *Id.* at 13a. As the court concluded, "*Zilog*'s statement of the law is clear, directly addresses the question at issue in here, and is binding on this court." *Ibid.* Thus, in the Ninth Circuit, "the creditor's good faith belief that the discharge injunction does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable." *Id.* at 12a.

Because the court found it uncontested that "the [c]reditors possessed a good faith belief that the discharge injunction did not apply to their claims," it concluded "their good faith belief, even if unreasonable, insulated them from a finding of contempt." Pet. App. 13a. With that sole holding disposing of the appeal, the court declined to reach a cross-appeal by certain respondents (challenging whether the discharge injunction was indeed violated), and reversed the sanctions award. *Id.* at 14a-15a.[4]

b. Petitioner filed a petition for rehearing, arguing that the court's decision conflicted with the decisions of multiple circuits. The full court of appeals denied rehearing without a single judge requesting a vote. Pet. App. 16a-20a.

This Court subsequently granted certiorari.

SUMMARY OF ARGUMENT

According to the Ninth Circuit, a creditor's "good faith belief" precludes liability for discharge violations. Pet. App. 12a. That decision violates traditional rules of civil

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[4] As noted above, one respondent (Lorenzen) ultimately conceded that, in light of intervening circuit precedent, the discharge injunction was in fact violated. Pet. App. 14a n.6. The finding of a discharge violation is now conclusive for that respondent, and the court's "good faith" holding is thus indisputably outcome-determinative. *Id.* at 14a-15a & n.6.

contempt, conflicts with the Bankruptcy Code, and threatens the effective administration of the bankruptcy system. Discharge violations impose significant costs on debtors, who did nothing wrong. There is no basis for asking an innocent victim to pay the costs of a creditor's mistake. The judgment below should be reversed.

A. First and foremost, the Ninth Circuit's decision is incompatible with this Court's general principles of civil contempt. In *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187 (1949), the Court squarely held that good faith is irrelevant when "effect[ing] compliance" with an injunction. It explained that contempt is designed to enforce a decree—the law's protections are not contingent on the violator's state of mind. If a party fails to seek guidance from the issuing court, it assumes the risk of any mistakes and is responsible to "pay the damages caused by their violations."

Courts nationwide have consistently applied *McComb*'s framework in a multitude of settings, and it applies comfortably in the bankruptcy context. The discharge injunction is activated by both statutory directive and judicial decree. It strictly prohibits the collection of discharged debts, and it applies irrespective of a creditor's state of mind. The bankruptcy rules provide a specific procedure for creditors to determine whether a debt falls within the discharge or not; anyone choosing to unilaterally collect without seeking the bankruptcy court's guidance assumes the "risk of crossing the forbidden line."

The Ninth Circuit's holding below—"good faith" precludes contempt—directly contradicts *McComb*'s holding that "[a]n act does not cease to be a violation * * * merely because it may have been done innocently." Under this Court's decisions, respondents are liable to "compensate for losses or damages sustained by reason of noncompliance," good faith or not.

B. Apart from violating this Court's civil-contempt jurisprudence, the Ninth Circuit's standard is also incompatible with the Code.

1. The Ninth Circuit's standard cannot be squared with the Code's text or context. Congress granted bankruptcy courts broad remedial authority in Section 105. That provision authorizes courts to enforce the Code's provisions, which includes reestablishing the discharge (after violations) and making the debtor whole. The discharge secures the fresh start, and the fresh start is not restored if the debtor is left short on funds after defending an illegitimate collection action. There is nothing in law or logic categorically precluding remedial contempt where a party indeed violated the debtor's rights but did so in good faith.

This practice is further reinforced by the Code's context. In a variety of surrounding provisions, Congress proved it knew how to impose good-faith requirements where it so wished. Yet there is no hint of a general good-faith defense for discharge violations. What there is instead is a cause of action for automatic-stay violations (11 U.S.C. 362(k)) that plainly does *not* insulate good-faith errors. Stay violations and discharge violations are cut from the same cloth, and Congress's express policy in Section 362(k) reaffirms the overwhelming majority approach to Section 105.

2. The Code's purpose is also directly frustrated by the Ninth Circuit's standard. Subjective-intent requirements are difficult to administer; they encourage pretextual excuses and protracted litigation, and they undercut the debtor's ability to protect its rights. Congress granted debtors a fresh start, and it did not indicate any desire to stick debtors with the cost of creditor error. Creditors are in a better position to pay for the harm they wrongfully inflict (even by accident); there is no reason to let a good-

faith creditor off the hook only to ask a *good-faith debtor* to suffer the consequences.

3. The Code's history also cuts against a good-faith exception. Under the rule applied for decades in the vast majority of jurisdictions, the creditor's state of mind was irrelevant for remedial contempt. That rule has served the interests of the Code and advanced its effective administration. Congress has revamped the Code multiple times, and yet it has not once cast doubt on this sound practice.

Section 105 protects the "fresh start" and deters misconduct. *McLean*, 794 F.3d at 1320; see *McComb*, 336 U.S. at 194. The Ninth Circuit erred in eroding this essential tool for enforcing the Code, and its decision should be reversed.

ARGUMENT

A CREDITOR'S GOOD-FAITH BELIEF DOES NOT PRECLUDE LIABILITY FOR DISCHARGE VIOLATIONS UNDER THE BANKRUPTCY CODE

A. Good Faith Is Irrelevant Under This Court's Longstanding Rules For General Civil Contempt

The Ninth Circuit's position flouts bedrock contempt principles. This Court established the controlling framework back in *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187 (1949), and lower courts have faithfully applied that framework ever since. Under that framework, good faith "does not relieve from civil contempt." *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949). The court is permitted to order "damages caused by the[] violations," and "[t]he measure of the court's power * * * is determined by the requirements of full remedial relief." *Id.* at 193. There is no reason to deviate from this traditional standard in the bankruptcy context alone.

1. The Ninth Circuit should have ignored the creditor's subjective intent because this Court has *already said to ignore subjective intent.* In *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187 (1949), this Court squarely held that state of mind is irrelevant in the civil-contempt setting. 336 U.S. at 191. It explained that decrees and laws are "fashioned" to grant benefits to a protected class, and those benefits are not contingent "on the [violator's] state of mind." *Ibid.* It is up to regulated parties to obey the legal command, and their conduct "does not cease to be a violation of a law and of a decree merely because it may have been done innocently." *Ibid.*[5]

The Court also addressed the fundamental fairness of this approach. Anyone uncertain of an injunction's scope is perfectly free to seek "clarification" from the issuing court. 336 U.S. at 192. When parties instead decide to "make their own determination of what the decree mean[s]," they "act[] at their peril": "[t]hey kn[o]w full well the risk of crossing the forbidden line," so "there can be no complaint that the burden of any uncertainty in the decree is on respondent's shoulders." *Id.* at 192-193. The Court accordingly found it appropriate for the contemnors to "compensate for losses or damages sustained by reason of [their] noncompliance." *Id.* at 191, 193.[6]

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[5] The Court distinguished the framework for "civil contempt" from the rules for "criminal contempt." 336 U.S. at 191. In the civil-contempt setting, the issue is "the power of a court to grant the relief that is necessary to effect compliance with its decree," which includes compensatory damages. *Id.* at 193.

[6] Cf. *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 581-583 (2010) ("We have long recognized the 'common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally.' * * * Our law is therefore no stranger to the possibility that an act may be 'intentional' for purposes of civil liability, even if the actor lacked actual knowledge that her conduct violated the law.").

2. These general principles apply on all fours in this context. Just as in *McComb*, the discharge is a product of a statutory command (11 U.S.C. 524(a)(2)) and a judicial order (J.A. 59-60). A creditor violating its terms is both flouting an injunction and violating the Code. Congress did not condition the discharge on the creditor's state of mind; the "fresh start" is the Code's overriding objective, and there is an "important federal interest" in securing the debtor's full discharge rights. *In re Pratt*, 462 F.3d 14, 17, 19 (1st Cir. 2006); see also *Grogan*, 498 U.S. at 286. The discharge applies whether a creditor *thinks* it applies or not. And the Code has readily available means for seeking preclearance from the bankruptcy court (see Fed. R. Bankr. P. 4007(a), (b)); any creditor who acts unilaterally assumes the risk of error and the possibility of paying "damages caused by the[] violations." *McComb*, 336 U.S. at 193; *Jove Eng'g, Inc.* v. *IRS*, 92 F.3d 1539, 1557 (11th Cir. 1996).

The Ninth Circuit's rationale conflicts with this controlling authority. A rule "insulat[ing]" good-faith creditors from contempt (Pet. App. 13a) eliminates the Code's "benefits" and wrongly shifts the costs of non-compliance to the very class the law is designed to protect. *McComb*, 336 U.S. at 191. It undermines the "decree" and excuses those who roll the dice—leaving innocent debtors to pay the costs of the creditor's non-compliance. The Ninth Circuit gave no excuse why it failed to apply this Court's precedent. Other courts have acknowledged *McComb*'s applicability to discharge violations (*e.g.*, *In re Cherry*, 247 B.R. 176, 187 (Bankr. E.D. Va. 2000)), and the Ninth Circuit itself earlier recognized it applied to automatic-stay violations (*In re Dyer*, 322 F.3d 1178, 1191 (9th Cir. 2003)). Had the panel simply grappled with *McComb*, it would

have reached the opposite result. The panel erred in refashioning, without one whit of explanation, the bedrock principles of general civil contempt.[7]

B. Good Faith Is Irrelevant Under A Proper Application Of The Bankruptcy Code

Even aside from general contempt principles, the Code provides ample authority to redress discharge violations and restore the status quo ante—which requires compensating debtors for the losses suffered via a creditor's error. The Ninth Circuit's good-faith requirement would cripple that authority. The panel did not explain how its views were consistent with the text, context, purpose, or history of the Code, and it did not articulate any basis for letting creditors off the hook simply because they insist their wrongheaded (even "*unreasonable*") mistakes were done with innocent intent. Pet. App. 13a.

The Code's fresh start means little if debtors are constantly asked to spend uncompensated funds resisting

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[7] Other courts of appeals have applied *McComb* in an identical fashion in a variety of non-bankruptcy settings. *E.g.*, *SEC* v. *McNamee*, 481 F.3d 451, 455-456 (7th Cir. 2007) ("*scienter* is not required in civil-contempt proceedings"); *Food Lion, Inc.* v. *United Food & Commercial Workers Int'l Union, AFL-CIO-CLC*, 103 F.3d 1007, 1016 (D.C. Cir. 1997) ("[A] finding of bad faith on the part of the contemnor is *not* required. Indeed, the law is clear in this circuit that 'the [contemnor's] failure to comply with the court decree need not be intentional.'"); accord *Harley-Davidson, Inc.* v. *Morris*, 19 F.3d 142, 148-149 (3d Cir. 1994). These courts have faithfully followed *McComb* for decades without any hint of problems or unfairness. There is no reason to think *McComb*'s logic somehow loses its force in the bankruptcy context alone. See, *e.g.*, *In re Butler*, No. 09-8101, 2011 WL 806078, at *9 (Bankr. C.D. Ill. Mar. 2, 2011) ("If a creditor's conduct violates the [discharge] injunction, good faith is no defense. * * * This principle is consistent with civil contempt proceedings outside of bankruptcy.") (citing *McComb*, 336 U.S. at 191); *In re Cochran*, No. 83-1393, 2000 WL 35799020, at *4 (Bankr. S.D. Iowa Aug. 8, 2000) (same).

baseless attempts to collect discharged debts. For decades now, the overwhelming majority of courts nationwide have construed their authority under Section 105 to allow compensatory relief to reverse the effects of violations and bring debtors back to their original baseline before the violation occurred. See Pet. 11-21 (so establishing). This practice is consistent with the Code's overall context, which shows Congress crafted good-faith exceptions where it so wished—but not here. And it is again consistent with Congress's efforts to usher these matters before the supervision of the bankruptcy judge, as evidenced by the creation of a simple, accessible means for good-faith creditors to return to bankruptcy court and seek guidance on their rights—*before* imposing substantial costs on the vulnerable class (debtors) who can least afford them.

The Ninth Circuit brushed off the obvious harm and unfairness in asking *good-faith* debtors to pay for a good-faith creditor's mistake. Its novel rule encourages aggressive creditors to take advantage of debtors, and it promises the huge waste of time and resources as courts try to ferret out pretextual good-faith defenses. The Code, properly understood, authorizes civil remedial relief irrespective of the creditor's state of mind. The Ninth Circuit's categorical rule has no mooring in the Code's text, context, purpose, or history, and it should be rejected.

1. The Code's Text And Context Confirm That Subjective Intent Is Irrelevant To Remedying Discharge Violations

a. Section 105 textually authorizes courts to enforce specific orders under the Code, including the discharge injunction: "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," and may "tak[e] any action or

mak[e] any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." 11 U.S.C. 105(a); see also *Bennett*, 298 F.3d at 1069 (so holding regarding Section 524).

This remedial authority is exceptionally broad. While it limits courts to enforcing or restoring provisions of the Code (or related "orders or rules"), it otherwise places no obvious textual limits on the type or character of relief. On the contrary, by "us[ing] the broad term 'any,'" Section 105 "encompasses all forms of orders including those that award monetary relief." *Jove*, 92 F.3d at 1554; see also, *e.g.*, *In re Terrebonne Fuel & Lube, Inc.*, 108 F.3d 609, 613 (5th Cir. 1997) (holding Section 105's "unambiguous" language authorizes "civil contempt order[s]" that "compensate[] a debtor" for discharge violations, as "both necessary and appropriate to carry out the provisions of the bankruptcy code"). As a result, "bankruptcy courts across the country have appropriately used their statutory contempt power to order monetary relief * * * when creditors have engaged in conduct that violates § 524." *Bessette*, 230 F.3d at 445.

And in exercising that remedial contempt authority, the courts of appeals (aside from the Ninth Circuit) have recognized that subjective intent was irrelevant. In *Hardy*, for example, the Eleventh Circuit held that Section 105 authorized such relief irrespective of a creditor's good faith: "'the focus of the court's inquiry in civil contempt proceedings is not on the subjective beliefs or intent of the alleged contemnors in complying with the order, but whether in fact their conduct complied with the order at issue.'" 97 F.3d at 1390. Although sanctions "under a court's *inherent* powers" may require "'bad faith'"

(*ibid.*) (emphasis added)),[8] the court explained that the threshold is lower for Section 105's "statutory contempt": the creditor need only (i) be "aware of the discharge injunction," and (ii) have "intended the actions" that violated it. *Ibid.* (adopting the analogous "two-pronged test" for "determin[ing] willfulness in violating [Section 362's] automatic stay").

This understanding of Section 105 is unassailably correct. The point of the contempt order is to enforce the discharge injunction. And the discharge is designed to eliminate all banned collection attempts, *including the costs of resisting those attempts*. When a creditor violates the injunction, a contempt award is both "necessary" and "appropriate" to restore the status quo ante, which effectuates Section 524(a)'s directives. *Bessette*, 230 F.3d at 444-445; accord *Dyer*, 322 F.3d at 1193; *Jove*, 92 F.3d at 1554. Otherwise debtors are left covering the costs of correcting the creditor's mistake, leaving them in a worse condition than their proper baseline under the Code. See, *e.g.*, *McComb*, 336 U.S. at 191.

The Ninth Circuit has no obvious basis for declaring good faith relevant (much less dispositive) to these objectives. The contempt question is binary: the discharge injunction was either violated or it was not. Every uncompensated violation chips away at the debtor's fresh start and undermines the Code, irrespective of the creditor's

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[8] Section 105's statutory powers are independent of a court's inherent contempt authority. See, *e.g.*, *Jove Eng'g, Inc.* v. *IRS*, 92 F.3d 1539, 1554 (11th Cir. 1996); see also, *e.g.*, *In re Terrebonne Fuel & Lube, Inc.*, 108 F.3d 609, 612-613 (5th Cir. 1997). Again, under Section 105, "Congress has empowered bankruptcy courts broadly to 'issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of' the Bankruptcy Code," "including sanctions to enforce the discharge injunction." *In re McLean*, 794 F.3d 1313, 1320 (11th Cir. 2015).

intent. See *Fina*, 550 F. App'x at 156 (the debtor "had to defend the lawsuit himself," generating "a financial cost that interfered with his right to a fresh economic start"). Compensatory relief is thus necessary to "carry out the provisions of this title" by "enforc[ing]," "implement[ing]," and ultimately restoring (to its fullest practical extent) the discharge injunction (11 U.S.C. 105(a)). See, *e.g.*, *Terrebonne Fuel*, 108 F.3d at 613.

In short, Section 105 grants courts the power to enforce the discharge by providing make-whole relief—thereby restoring the original state of the debtor's fresh start. There is no textual hook limiting this restorative power because a violator happened to act in good faith.[9]

b. In multiple respects, this plain-text understanding of Section 105 is advanced by the Code's statutory context and surrounding provisions.

First, although Congress did not include a *general* good-faith defense in Section 524, it *did* include narrow good-faith exceptions for specified activity. See, *e.g.*, 11 U.S.C. 524(*l*) (authorizing certain "good faith" actions that would otherwise violate the Code, "[n]otwithstanding any other provision of this title"). This confirms that Congress was well aware how to craft good-faith discharge defenses

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[9] Respondents earlier argued that some courts excuse good-faith "'[c]onduct that evinces substantial, but not complete, compliance with the court order.'" Br. in Opp. 14 (quoting *Howard Johnson Co. v. Khimani*, 892 F.2d 1512, 1516 (11th Cir. 1990)). But true or not, respondents' failure to comply here was *total*. They sought discharged fees in state court and forced petitioner to expend significant funds defending himself from conduct that violated the Code. The fact that they acted in conjunction with a (void) state-court order (see 11 U.S.C. 524(a)(1))—and without first seeking available review in the bankruptcy court—does not override the bedrock rule that subjective intent is irrelevant. Nor does it explain how the discharge is fully restored if the debtor is left short on funds after defending the illegitimate collection action.

when it so wished. The fact that it chose not to excuse general discharge violations—despite the prevalent judicial practice of imposing remedial orders to compensate debtors—speaks volumes.

Second, the Ninth Circuit's "good-faith" requirement is directly at odds with Congress's express right of action under Section 362(k) for stay violations. Although Section 362(k) generally authorizes "actual damages" and (potentially) "punitive damages," Congress limited recovery for certain violations to "actual damages": those "based on an action taken by an entity in the *good faith belief* that subsection (h) applies to the debtor." 11 U.S.C. 362(k)(2) (emphasis added). The fact that Congress created a good-faith exception under subsection (2) confirms that good faith does *not* excuse general stay violations under subsection (1). See, *e.g.*, *In re Mu'min*, 374 B.R. 149, 168-169 (Bankr. E.D. Pa. 2007).

Courts broadly recognize the parallel between stay and discharge violations, and generally apply the identical standards to each. See, *e.g.*, *Zilog*, 450 F.3d at 1008 n.12. Congress's decision *not* to recognize a general good-faith exception supports petitioner's view while undercutting the Ninth Circuit's position below.[10]

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[10] Nor is it telling that Congress created a private right of action for stay but not discharge violations. There is effectively uniform consensus that Section 362(k) was not meant to displace the general practice of awarding compensatory relief under Section 105; the provision was instead designed to increase protections for individual consumers (as opposed to corporate debtors or trustees), and to respond to concerns raised by some courts that the automatic stay, unlike the discharge injunction, was invoked by statute rather than court order—and thus, to some, fell outside traditional contempt authority. That concern was not relevant to court-ordered discharge injunctions. See, *e.g.*, *Walls* v. *Wells Fargo Bank, N.A.*, 276 F.3d 502, 509 (9th Cir. 2002).

Third, Congress expressly authorized creditors to invoke the bankruptcy court's jurisdiction to confirm that a debt is (or is not) dischargeable. See Fed. R. Bankr. P. 4007(a), (b). This reflects a clear logical scheme: rather than providing a good-faith defense to creditors who guess wrong, Congress set up a procedure so creditors would not have to guess in the first place. A creditor who refuses to invoke these procedures takes an obvious risk that its actions might run afoul of the discharge. But absolutely nothing in the Code's text or history suggests Congress intended to excuse violations of those who subjectively believe, wrongly, that their conduct is excused.[11]

2. The Code's Purpose Would Be Profoundly Impaired If Good Faith Excuses Discharge Violations

The Ninth Circuit's standard poses a grave threat to the Code's fresh start and the effective administration of the bankruptcy system.

A "primary purpose[]" of bankruptcy is to "'relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.'" *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 244 (1934). The Code's discharge injunction is essential to securing that fresh start. It is the single tool that best protects debtors as they seek to rebuild from financial misfortune and avoid the financial stress that drove them into bankruptcy. *In re Hyman*, 502 F.3d 61, 66 (2d Cir. 2007).

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[11] To be sure, petitioner does not suggest that a creditor faces sanctions for seeking relief from the bankruptcy court (contra Pet. App. 46a-47a); respondents' mistake was focusing on the wrong forum. State courts have no power to rewrite Section 524 or modify the Code's discharge injunction. Where, as here, they guess wrong, their orders are "void." 11 U.S.C. 524(a)(1). Nothing prevented respondents from lodging a proper request with the bankruptcy court.

Its protection is so fundamental that Congress declared acts that violate the discharge "void[]" (11 U.S.C. 524(a)(1))—not merely voidable—and courts recognize broad authority to redress violations with "'full remedial relief'" (*Bessette*, 230 F.3d at 445).

The Ninth Circuit's decision debilitates these core protections. Under its holding, the cost of a creditor's good-faith mistake comes out of the debtor's pocket. There is no basis for asking debtors to absorb the costs of a *creditor's* error. Debtors are a sensitive class. They often emerge from bankruptcy in a fragile economic state. The loss of even a few hundred dollars can mean the difference between buying food and clothes for their families or struggling to meet basic needs. The correct incentive holds creditors accountable for their own misconduct, rather than shift those costs to innocent debtors who did nothing wrong. *Jove*, 92 F.3d at 1555-1556 (even "'inadvertent'" violations "cause[] actual and necessary extra expense to [the debtor]," and the "burden" must not "be shifted to [the debtor] or [its] counsel").[12]

The Ninth Circuit's rule also "gives creditors license to disregard discharge injunctions" with "pretextual arguments," making contempt "difficult to prove in the Ninth Circuit." Bill Rochelle, *Violation of Discharge Is Now Difficult to Prove in the Ninth Circuit*, ABI (Apr.

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[12] Moreover, creditors have little excuse for any mistake: they have the ability to seek declaratory relief *before* acting, thereby avoiding harm in the first place. *Fina*, 550 F. App'x at 156 ("As the bankruptcy judge noted in this case, he is routinely asked to consider such modifications to discharge injunctions, and he routinely grants them. The proper course for the appellants was to first seek leave of the bankruptcy court before pursuing judgment against the debtor."); see *McComb*, 336 U.S. at 192-193. If creditors decide to roll the dice, they alone should pay the costs of their miscalculations. *Jove*, 92 F.3d at 1557.

25, 2018) <tinyurl.com/ca9discharge>; see also *Murphy*, 892 F.3d at 42 (if "good faith" excuses a discharge violation, "it is hard to imagine a case where a taxpayer could ever collect against the government").

It is not difficult for sophisticated, aggressive, well-funded creditors to conjure up pretextual reasons for pushing the discharge's limits. But it *is* difficult to expose a pretext for what it truly is. An examination into a creditor's state of mind requires hearings and testimony, and it imposes substantial costs on both parties and courts. Few attorneys will take such cases on contingency, and debtors can scarcely afford to pay for counsel on the heels of a bankruptcy. The result leaves debtors defenseless against even "unreasonable" behavior: "there is little to deter stay violations without the threat of contempt, and debtors may not be able to afford counsel to enforce their protections if contempt sanctions are generally unavailable." Bill Rochelle, *Raising a Circuit Split, Ninth Circuit's Taggart Opinion Heads for a 'Cert' Petition*, ABI (Sept. 11, 2018) <tinyurl.com/taggartcircuitsplit> (Rochelle).

Under the standard applied outside the Ninth Circuit, Section 105 serves its intended function as an essential remedial device and necessary deterrent. The Ninth Circuit's contrary decision undermines those critical objectives, wasting time and resources in a system that requires efficiency.

3. The Code's History Confirms That Subjective Intent Is Irrelevant To Remedying Discharge Violations

The Ninth Circuit's decision is also in significant tension with the Code's history. And the historical argument is both simple and obvious. For decades now, it has been the consistent (if not uniform) practice in jurisdictions na-

tionwide to award compensatory relief for discharge violations irrespective of subjective intent. See Pet. 11-21. As the First Circuit summarized, under settled law, when courts "evaluat[e] violations of both automatic stays and discharge orders," "[a] good faith belief in a right to the property" is "not relevant to determining whether the creditor's violation was willful." *IRS* v. *Murphy*, 892 F.3d 29, 38-39 (1st Cir. 2018) (surveying nationwide practice).

Congress has kept a close eye on the Code and its practical operation, including enacting major revisions. Those modifications have included amendments touching closely to the very interests at stake in this case. See, *e.g.*, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, §§ 305(1)(B), 441(1)(A), 119 Stat. 23, 79, 114 (enacting Section 362(k)(2)). It is inconceivable that Congress would have left this widespread rule unchallenged if it disagreed with the standards adopted by the vast majority of courts. But indeed, rather than impose an express "good faith" requirement, Congress enacted Section 362(k)(2), which (i) confirms that Section 362(k)(1) generally does *not* have a good-faith component, and (ii) still authorized *actual damages* even where the violation was innocent.

This historical trend is consistent with the textual clues, which, in turn, are consistent with the profound importance of the discharge to the Code's administration. Jurisdictions nationwide have enforced the discharge, awarding compensatory relief, for decades now; there has been absolutely no concrete evidence that the standard is unfair, unworkable, or difficult to administer. On the contrary, it has proven essential to protecting the debtor's fresh start and deterring abuse. The Ninth Circuit was wrong to needlessly upset this sound practice.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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FEBRUARY 2019